The Perak Chinese Maternity Association v Thomas Jothinayagam Harris & Anor

HIGH COURT (IPOH) — APPLICATION FOR JUDICIAL REVIEW NO AA-25-18–08 OF 2019
HASHIM HAMZAH J
16 OCTOBER 2020

Civil Procedure — Judicial review — Certiorari — First respondent was appointed by applicant as resident consultant anesthesiologist — First respondent was informed by applicant that his practicing privileges would not be renewed — First respondent filed representation under s 20 of the Industrial Relations Act 1967 — Industrial Court found in favour of first respondent — Applicant filed judicial review application against Industrial Court's decision — Whether first respondent was applicant's workman/employee or independent contractor — Whether there was error of law committed by Industrial Court — Rules of Court 2012 O 53

Labour Law — Employment — Whether contract of service or independent contractor — Industrial Relations Act 1967 s 20

Vide an agreement dated 25 September 2012, the first respondent was appointed by the applicant as the resident consultant anesthesiologist at the applicant's hospital ('the hospital') with effect from 1 January 2012 until 31 December 2013 ('the agreement'). Before the expiry of the agreement, the hospital informed the first respondent that his practicing privileges would not be renewed. Dissatisfied, the first respondent made a representation under s 20 of the Industrial Relations Act 1967 ('the Act') which was later referred to the Industrial Court ('the second respondent') for adjudication. The second respondent decided in favour of the first respondent and awarded him the sum of RM905,511.32 ('the said decision'). The present action was a judicial review application pursuant to O 53 of the Rules of Court 2012 for certiorari to quash the said decision. The issue for the court's determination was whether the first respondent was the applicant's workman/employee or an independent contractor.

Held, allowing the application with costs of RM5,000 subject to allocator:

(1) Based on s 20(1), (2) and (3) of the Act, a representation on dismissal under the Act was only applicable to a 'workman'. The following clauses of the agreement proven that the first respondent was an independent contractor and not the applicant's workman: (a) cl 16.1 and 16.2 which

A stated the express, clear and unambiguous intention of the parties regarding their relationship; (b) cl 5.1, 5.6 and 5.7 which provided the first respondent's right to charge any amount of fees for his service and cl 12 which required the first respondent to pay administrative fee; (c) cl 57 which provided that the hospital was to pay the first respondent's
B professional fees to a third party company and not to the first respondent himself; (d) cl 14.4 and 14.5 which provided that the first respondent had to take an adequate professional indemnity insurance policy at his own cost and expenses and cl 15 which provided that the first respondent was liable for his own acts, defaults, negligence or omissions in the conduct of
C his professional practice; (e) cl 16.3 which stated that the applicant and the hospital would not make any Employee Provident Fund and Social Security Organisation contribution to the first respondent; (f) cl 10.3 which stated that if the first respondent was absent from the hospital, he must personally at his own expense provide a duly qualified locum to
D substitute him; and (g) cl 18.1 which showed that the first respondent did not enjoy a continuous employment for an indefinite period (see paras 29, 40, 42–46 & 48–50).

(2) Based on the surrounding circumstances of the case, even from
E 1995–1997, the first respondent was engaged by other independent resident consultants at the hospital and had never directly engaged or employed by the applicant. The terms governing the first respondent's practicing privileges before 2010 had clearly shown that the first respondent was merely an independent contractor. Further, the hospital
F was only contractually obliged to remit fees to the resident consultants and the hospital had never pay any salary to the first respondent. The first respondent also did not pay tax as an employee of the hospital and would not be paid any money even if he went on leave. Lastly, the fees collected by the first respondent was for his professional services and he was free to
G enter into such private and independent arrangement on remuneration sharing with another person. Clearly, based on all the above, the relationship between the first respondent and the applicant was based on a contract for service, and that the first respondent was clearly an independent contractor of the applicant (see paras 52–58).

H (3) The second respondent noted that the first respondent was prohibited from practicing in another hospital when he was in service to the hospital based on cl 4.5 of the agreement. However, upon careful perusal of this clause, the court did not see any form of control so as to establish an
I employer and employee relationship between the first respondent and the applicant. It merely stated that the first respondent was to actively and exclusively maintain his presence and devote his whole time and attention at the hospital, which was required regardless of whether a person was under a contract of service or a contract for service in the same professional field (see paras 61–62).

(4) The second respondent noted that the first respondent was required to render his services to patients referred by the hospital and he had no liberty to choose his patients. What the second respondent failed to consider was that the first respondent was a consultant anesthetist whose practice generally did not have any clinic or walk-in patients. It was a generally known fact that an anesthetist generally attended patients who had already been admitted to the hospital and who were undergoing surgery. Therefore, the court did not see any form of control against the first respondent in the present case (see para 63).

(5) The second respondent noted that the first respondent had to obtain or buy all medications only from the hospital. In this regard, cll 7.1 and 9.4 merely stipulated that all of the first respondent's patients must be directed to obtain their medications and drugs from the hospital's pharmacy. Further, the prohibition against purchasing new equipment, instruments and medications when the same were available in the hospital was not a total prohibition where a prior consent may be obtained if the first respondent chose to do so. The first respondent was not prohibited from purchasing new medications if the same were not available in the hospital (see para 64).

(6) The second respondent noted that the first respondent was subjected to the working hours stipulated by the hospital. The court did not see this as a form of control substantial enough to be considered as a factor to determine an employer and employee relationship. This provision was only there to ensure business efficacy and that the first respondent was there when his services were needed. It did not affect the first respondent in terms of his control over his own work and the method he wished to perform his work (see para 65).

(7) The second respondent noted that first respondent was subjected to the compliance with all by-laws, rules and regulations, and procedures in the hospital as could be seen under cl 4.1 of the agreement. However, in the evidence itself, Dr Mah Kin Kheong stated that the regulations and standard operating procedures were required to be complied with even by independently contracted doctors to ensure proper functioning of the hospital and for due compliance with the law. This was purely administrative and procedural in nature. Nowhere was it provided that the first respondent's exercise of professional judgment in the care of his patients was impinged in any way (see para 68).

(8) It is trite that an inferior tribunal or other decision-making authority in exercising its quasi-judicial or administrative function has no jurisdiction to commit an error of law. Some of the examples when an error of law is committed is when the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations or if he misconstrues the terms of any

relevant statute or misapplies or misstates a principle of the general law. In the present case, based on all the above, the second respondent had committed an error of law (see para 67).

[Bahasa Malaysia summary

Melalui perjanjian bertarikh 25 September 2012, responden pertama dilantik oleh pemohon sebagai perunding anestesiologi di hospital pemohon ('hospital') berkuat kuasa dari 1 Januari 2012 hingga 31 Disember 2013 ('perjanjian'). Sebelum tamatnya perjanjian tersebut, pihak hospital memberitahu responden pertama bahawa sijil pengmalannya tidak akan diperbaharui. Tidak berpuas hati, responden pertama membuat representasi di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta') yang kemudiannya dirujuk ke Mahkamah Perusahaan ('responden kedua') untuk dibicarakan. Responden kedua membuat keputusan yang memihak kepada responden pertama dan mengawardkannya sejumlah RM905,511.32 ('keputusan tersebut'). Tindakan semasa adalah permohonan semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah 2012 untuk memohon certiorari bagi membatalkan keputusan tersebut. Isu untuk penentuan mahkamah adalah sama ada responden pertama adalah pekerja/kakitangan pemohon atau kontraktor bebas.

Diputuskan, membenarkan pemohon dengan kos sebanyak RM5,000 tertakluk kepada alokator:

(1) Berdasarkan s 20 (1), (2) dan (3) Akta, representasi mengenai pemecatan di bawah Akta hanya terpakai untuk 'pekerja'. Klausa-klausa perjanjian tersebut seperti berikut membuktikan bahawa responden pertama adalah kontraktor bebas dan bukan pekerja pemohon: (a) klausa 16.1 dan 16.2 yang menyatakan niat yang terang, jelas dan tidak berubah-ubah pihak-pihak mengenai hubungan mereka; (b) klausa 5.1, 5.6 dan 5.7 yang memberikan hak kepada responden pertama untuk mengenakan sejumlah yuran untuk perkhidmatannya dan klausa 12 yang menghendaki responden pertama membayar yuran pentadbiran; (c) klausa 57 yang memperuntukkan bahawa hospital harus membayar yuran profesional responden pertama kepada syarikat pihak ketiga dan bukan kepada responden pertama sendiri; (d) klausa 14.4 dan 14.5 yang memperuntukkan bahawa responden pertama harus mengambil polisi insurans indemniti profesional yang mencukupi dengan kos dan perbelanjaannya sendiri dan klausa 15 yang memperuntukkan bahawa responden pertama bertanggungjawab atas tindakan, kegagalan, kecuaian atau kelalaian pelaksanaan amalan profesionalnya; (e) klausa 16.3 yang menyatakan bahawa pemohon dan hospital tidak akan memberikan sumbangan Kumpulan Wang Simpanan Pekerja dan Pertubuhan Keselamatan Sosial kepada responden pertama; (f) klausa 10.3 yang menyatakan bahawa sekiranya responden pertama tidak hadir

ke hospital, dia mesti secara peribadi dengan perbelanjaan sendiri menyediakan lokum yang berkelayakan untuk menggantikannya; dan (g) klausa 18.1 yang menunjukkan bahawa responden pertama tidak menikmati pekerjaan berterusan untuk jangka masa yang tidak ditentukan (lihat perenggan 29, 40, 42–46 & 48–50).

(2) Berdasarkan keseluruhan keadaan kes, bahkan dari tahun 1995 hingga 1997, responden pertama dilantik oleh perunding perubatan bebas yang lain di hospital tersebut dan tidak pernah bekerja atau dilantik secara langsung oleh pemohon. Terma-terma dalam sijil pengamalan responden pertama sebelum tahun 2010 dengan jelas menunjukkan bahawa responden pertama hanyalah kontraktor bebas. Selanjutnya, hospital hanya diwajibkan secara kontrak untuk membayar yuran kepada perunding perubatan dan hospital tidak pernah membayar gaji kepada responden pertama. Responden pertama juga tidak membayar cukai sebagai pekerja hospital dan tidak akan dibayar wang walaupun dia bercuti. Akhir sekali, yuran yang diterima oleh responden pertama adalah untuk perkhidmatan profesionalnya dan dia bebas untuk memasuki perjanjian persendirian dan bebas mengenai pembahagian imbuhan dengan individu lain. Jelas berdasarkan semua perkara di atas, hubungan antara responden pertama dan pemohon didasarkan pada kontrak untuk perkhidmatan, dan bahawa responden pertama jelas merupakan kontraktor bebas pemohon (lihat perenggan 52–58).

(3) Responden kedua menyatakan bahawa responden pertama dilarang untuk menjalankan amalan perubatan di hospital lain ketika dia bertugas di hospital tersebut berdasarkan klausa 4.5 perjanjian. Namun, setelah meneliti klausa ini dengan teliti, mahkamah tidak melihat adanya bentuk kawalan sehingga dapat mewujudkan hubungan majikan dan pekerja antara responden pertama dan pemohon. Ini hanya menyatakan bahawa responden pertama hendaklah secara aktif dan eksklusif mengekalkan kehadirannya dan mencurahkan seluruh masa dan perhatiannya di hospital, yang mana ini sememangnya diperlukan tanpa mengira sama ada seseorang itu berada di bawah kontrak perkhidmatan atau kontrak untuk perkhidmatan dalam bidang profesional yang sama (lihat perenggan 61–62).

(4) Responden kedua menyatakan bahawa responden pertama perlu memberikan perkhidmatannya kepada pesakit yang dirujuk oleh hospital tersebut sahaja dan dia tidak mempunyai kebebasan untuk memilih pesakitnya. Apa yang gagal dipertimbangkan oleh responden kedua ialah responden pertama adalah perunding anesthetist yang amalannya secara amnya tidak mempunyai klinik atau pesakit yang datang. Adalah fakta yang diketahui umum bahawa pakar anesthetist pada umumnya memeriksa pesakit yang sudah dimasukkan ke hospital dan yang menjalani pembedahan. Oleh itu, mahkamah tidak melihat

apa-apa bentuk kawalan terhadap responden pertama dalam kes ini (lihat perenggan 63).

(5) Responden kedua menyatakan bahawa responden pertama harus mendapatkan atau membeli semua ubat hanya dari hospital tersebut. Dalam hal ini, klausa 7.1 dan klausa 9.4 hanya menetapkan bahawa semua pesakit responden pertama harus diarahkan untuk mendapatkan ubat-ubatan mereka dari farmasi hospital. Selanjutnya, larangan membeli peralatan, instrumen dan ubat-ubatan baru jika yang sama tersedia di hospital bukanlah larangan secara total di mana kebenaran awal boleh diperoleh jika responden pertama memilih untuk melakukan sedemikian. Responden pertama tidak dilarang membeli ubat baru jika ubat yang sama tidak terdapat di hospital tersebut (lihat perenggan 64).

(6) Responden kedua menyatakan bahawa responden pertama tertakluk kepada waktu kerja yang ditetapkan oleh hospital. Mahkamah tidak melihat ini sebagai bentuk kawalan yang cukup besar untuk dianggap sebagai faktor untuk menentukan hubungan majikan dan pekerja. Peruntukan ini hanya ada untuk memastikan keberkesanan perniagaan dan responden pertama hadir ketika perkhidmatannya diperlukan. Ianya tidak mempengaruhi responden pertama dari segi penguasaannya terhadap pekerjaannya sendiri dan kaedah yang dia ingin gunakan untuk melaksanakan kerjanya (lihat perenggan 65).

(7) Responden kedua menyatakan bahawa responden pertama tertakluk kepada kepatuhan terhadap semua undang-undang kecil, kaedah-kaedah dan peraturan, dan prosedur di hospital tersebut seperti yang dapat dilihat di dalam klausa 4.1 perjanjian tersebut. Namun, dalam keterangan, Dr Mah Kin Kheong sendiri menyatakan bahawa peraturan dan prosedur operasi standard harus dipatuhi walaupun oleh doktor yang dilantik sebagai kontraktor bebas untuk memastikan fungsi hospital yang betul dan untuk mematuhi undang-undang. Ini hanya bersifat pentadbiran dan prosedur. Tidak dijelaskan bahawa pelaksanaan pertimbangan profesional responden pertama dalam menjaga pesakitnya terhalang dengan apa cara sekalipun (lihat perenggan 68).

(8) Telah menjadi undang-undang yang mantap bahawa tribunal bawahan atau badan-badan lain yang berkuasa membuat keputusan dalam menjalankan fungsi kuasi-kehakiman atau pentadbirannya tidak memiliki bidang kuasa untuk melakukan kekhilafan undang-undang. Beberapa contoh kekhilafan undang-undang dilakukan adalah apabila pembuat keputusan mengajukan pertanyaan yang salah kepada dirinya sendiri atau mengambil kira pertimbangan yang tidak relevan atau tidak mengambil kira pertimbangan yang relevan atau jika dia salah memahami syarat-syarat undang-undang yang relevan atau salah penerapan atau salah menyatakan prinsip undang-undang am. Dalam kes ini, berdasarkan semua hal di atas, responden kedua telah melakukan

kekhilafan undang-undang (lihat perenggan 67).] A

Cases referred to

David Vanniasingham Ramanathan v Subang Jaya Medical Centre Sdn Bhd [2013] 2 ILJ 451; [2013] 1 ILR 616, IC (folld)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (folld) B
Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (folld)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (refd) C
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1997] 3 CLJ 777, SC (refd)
Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) & Ors and other appeals [2018] 5 MLJ 321; [2018] 6 CLJ 334, CA (folld)
Norizan Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409; [2013] 4 ILR 477, FC (refd) D
R Rama Chandran v Industrial Court Of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd) E
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor [2014] 3 MLJ 457; [2014] 5 CLJ 906, CA (refd) F
Wu Siew Yong v Pulau Pinang Clinik Sdn Bhd & Anor [2011] 3 MLJ 506; [2011] 1 CLJ 255, HC (folld)

Legislation referred to

Industrial Relations Act 1967 ss 2, 20, 20(1), (2), (3) G
Rules of Court 2012 O 53

Leong Wai Hong (Brenda Chang Qing Wen with him) (Skrine) for the applicant.
Raam Kumar (KB Tan Kumar & Partners) for the first respondent.
Not present (Attorney General's Chambers) for the second respondent. H

Hashim Hamzah J:

INTRODUCTION

I

[1] This is the applicant's application for judicial review under O 53 of the Rules of Court 2012 ('the ROC 2012'). The applicant claimed for the following reliefs, namely:

A (a) an order of certiorari to quash the whole Award No 1975 dated 8 July 2019 which was delivered by the second respondent in Case No 10/4–557/14;

(b) such further or other relief as the court deems fit and proper; and

B (c) cost.

BACKGROUND FACTS

[2] Briefly, the facts in the present case are as follows.

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[3] On 18 October 1995, the first respondent applied for a resident anaesthetist post at the applicant's hospital ('the hospital'). However, the applicant did not approve the first respondent's application.

D

[4] By way of a letter dated 20 October 1995, one Dr Sivapalan and one Dr Sham Kumar jointly applied for the post of resident anaesthesiologists at the hospital. In the same letter, they sought to engage the first respondent as their substitute to provide services to the hospital in the event that either of them was E unavailable.

[5] By way of a letter dated 5 January 1996, the hospital confirmed the appointment of Dr Sivapalan and Dr Sham Kumar as the resident consultant anaesthetists. In the same letter, the hospital stated that the first respondent F would be allowed to act as substitute anaesthetist in the event that either Dr Sivapalan and Dr Sham Kumar was unable to provide their services to the hospital. The said letter was accepted and signed by Dr Sivapalan and Dr Sham Kumar.

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[6] Dr Sivapalan and Dr Sham Kumar continued to serve as resident anaesthetist at the hospital until the end of March 1997.

[7] Subsequently, on 3 April 1997, the applicant appointed Dr Mah Kin H Kheong as the new resident consultant anaesthetist.

[8] By way of a letter dated 10 April 1997, Dr Mah Kin Kheong informed the applicant that he would like to appoint the first respondent as his full-time assistant anaesthetist subject the hospital's approval.

I

[9] On 14 April 1997, the applicant granted the first respondent temporary practicing privileges for a period of two months. The first respondent was engaged by the resident anaesthetist as an assistant anaesthetist.

[10] By way of a letter dated 5 May 1997, Dr Mah Kin Kheong requested that all money and remuneration due to him by the hospital to be forwarded to a Exquisite Harmony Sdn Bhd. At all material time, the payment of money and remuneration by the hospital was made to the said company and not to the first respondent.

[11] At the request of Dr Mah Kin Kheong, the hospital renewed the first respondent's temporary practising privileges from time to time up until 28 February 2010.

[12] On 10 February 2000, the applicant renewed Dr Mah Kin Kheong's practising privileges as resident anaesthetist for two years (until 28 February 2002) subject to the agreed terms and conditions. The practising privileges were also extended to the first respondent with the same terms and conditions. The practising privileges of Dr Mah Kin Kheong and the first respondent were subsequently renewed in a similar manner up until 28 February 2010

[13] Dispute arose between the first respondent and Dr Mah Kin Kheong regarding the sharing of the collected fees. Their dispute was mediated by the hospital and resolved on 23 May 2009. It was agreed that Dr Mah Kin Kheong would pay the first respondent 45% from the collected fees with effect from May 2009. Parties had also agreed that the status quo between them would remain where the contract holder would be Dr Mah Kin Kheong and the first respondent would be Dr Mah Kin Kheong's assistant.

[14] On 8 September 2009, the first respondent applied for an independent contract with the hospital and for the status of resident consultant. The first respondent informed that their status quo would remain and the collected fees would be divided equally between Dr Mah Kin Kheong and the first respondent.

[15] On 13 November 2009, the hospital allowed the first respondent's application and appointed him as the resident consultant anaesthesiologistat the hospital subject to the conditions, among others, that if his partnership with Dr Mah Kin Kheong ceased, the hospital reserved the right to review his residential status or appoint new consultants.

[16] On 1 June 2010, an agreement was executed between the first respondent and the applicant where the first respondent was appointed as the resident consultant anaesthesiologist at the hospital ('the first agreement'). It was agreed that the agreement was valid for a term of one year.

[17] The first respondent's partnership with Dr Mah Kin Kheong had later ceased. The first respondent had subsequently entered into a remuneration

A sharing agreement with Dr Loke Yee Heng. It was agreed in the said agreement that the remuneration was based on the charges collected by the hospital after the deduction of the hospital's administrative charges. The manner in which the remuneration was to be shared between both of them has been specified in the said agreement.

B

[18] By way of a letter dated 27 December 2011, the hospital's consultants including the first respondent informed the hospital that they needed more time to study the terms of the new agreement and requested for an extension of their present practising privileges until the new agreement is signed. On
C 5 January 2012, the hospital extended the first respondent's practising privileges until 29 February 2012 for the same reason.

[19] On 25 September 2012, an agreement was executed between the first respondent and the applicantwhere the first respondent was appointed as the
D resident consultant anaesthesiologist at the hospital with effect from 1 January 2012 until 31 December 2013 ('the second agreement').

[20] Approximately two months before the expiry of the second agreement, by way of a letter dated 30 October 2013, the hospital informed the first
E defendant that his practising privileges will not be renewed.

[21] On 12 November 2013, in reply to the first respondent's letter dated 12 November 2013, the hospital informed that the proposed meeting between
F them is to explain the reasons for the non-renewal of the first respondent's practising privileges.

[22] Dissatisfied, the first respondent made a representation under s 20 of the Industrial Relations Act 1967 ('the Act') which was later referred to the
G second respondent for adjudication.

[23] On 8 July 2019, the second respondent decided in favour of the first respondent and awarded him the sum of RM905,511.32. The applicant then filed for leave to commence this judicial review application which was allowed
H by this court on 29 August 2019.

[24] This is the substantive hearing of the applicant's judicial review application.

I LAW ON JUDICIAL REVIEW APPLICATION

[25] Since the landmark Federal Court case of *R Rama Chandran v Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, our courts have started to shift from only reviewing the decision making process on the

ground of procedural impropriety to scrutinising the decision for substance and going into merit of the matter on the grounds of illegality, irrationality and proportionality.

[26] In decided cases after *Rama Chandran*, it has been observed that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court are arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review. In the Federal Court case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 it was held in no uncertain terms as follows:

> [15] We find that there is merit on the submission advanced by the learned counsel for the respondent. *Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*
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> [16] The Rama Chandran decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post Rama Chandran cases have applied some brakes to the courts' liberal approach in Rama Chandran. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the Rama Chandran decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate.
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> [17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
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> [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:

A (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba* [1998] 2 MLJ 372; B [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of Rama Chandran had been clearly explained and clarified. *Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by* C *taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review*. (Emphasis added.)

D **[27]** This trite principle of law has been succinctly summarised by the Federal Court in *Norizan Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409; [2013] 4 ILR 477 in the following words:

[41] It is trite law that *the decision of the Industrial Court is susceptible to judicial review on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and possibly* E *'proportionality' under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance.* (See *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147). Decided cases after Rama Chandran had clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been* F *arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review.* (see *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79; *Swedish Motors Assemblies Sdn Bhd v Hj Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288; *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 and *Ranjit Kaur S a/p Gobal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629). (Emphasis G added.)

[28] With the above mentioned principles of law in mind, I now turn to consider the issues raised by the parties in the present case.

H WHETHER THE FIRST RESPONDENT WAS THE APPLICANT'S WORKMAN/EMPLOYEE OR AN INDEPENDENT CONTRACTOR

[29] The core issue between the parties in the present case (which was also I raised before the second respondent in the proceeding below) is whether the first respondent was a 'workman' within the meaning under the Act. The law made it clear that a representation on dismissal under the Act is only applicable to a 'workman'. In particular, s 20(1), (2) and (3) of the Act provides that:

Section 20 Representations on dismissals.

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[30] In the present case, even though there was no challenge against the threshold jurisdiction of the second respondent in hearing the dispute, the second respondent was still entitled to determine the jurisdictional question of whether the first respondent was a workman within the meaning of the Act. The Supreme Court case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777 is authoritative on this issue. It was held that:

It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. *Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman* or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act. (Emphasis added.)

[31] Next, s 2 of the Act defines the term 'workman', 'employer' and 'contract of employment' in the following manner:

'*workman*' means *any person*, including an apprentice, *employed by an employer under a contract of employment to work for hire or reward* and for the purposes of any

A proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute ...

... '*employer*' means any person or body of persons, whether corporate or unincorporate, *who employs a workman under a contract of employment*, and includes B the Government and any statutory authority, unless otherwise expressly stated in this Act ...

... '*contract of employment*' means *any agreement*, whether oral or in writing and whether express or implied, *whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman*. (Emphasis added.)

C

[32] The test to be applied in determining whether a claimant is a workman under the Act has been expounded by Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 in the following words: D

In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304; [1981] 1 LNS 5 at p 311. *We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An* E *independent contractor who is engaged under a contract for services is not a workman under the Act.* We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resorted to this test. In all cases

where it becomes necessary to determine whether a contract is one of service or for F services, *the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control.* G *These include, but are not confined to, the conduct of the parties at all relevant times. Their determination is a question of fact.* When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services. *There is not a single satisfactory test that is available for the* H *determination of the issue*. (Emphasis added.)

[33] Although the determination of this issue is a question of fact which very much depends on the facts of each individual case, I am guided by these authorities in coming to my decision, namely: I

(a) *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 (FC);

(b) *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427 (FC);

(c) *Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) & Ors and other appeals* [2018] 5 MLJ 321; [2018] 6 CLJ 334 (CA); and

(d) *Wu Siew Yong v Pulau Pinang Clinik Sdn Bhd & Anor* [2011] 3 MLJ 506; [2011] 1 CLJ 255 (HC).

[34] I also cite with approval the decision in *David Vanniasingham Ramanathan v Subang Jaya Medical Centre Sdn Bhd* [2013] 2 ILJ 451; [2013] 1 ILR 616 even though it is not binding upon this court.

[35] Firstly, in the Federal Court case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529, it was held that:

> [98] We now apply the test to the present facts. *Stage 1 requires us to ascertain whether there is a relationship of employment or akin to employment between the hospital and Dr Kok. The doctor's practising agreement signed between the hospital and Dr Kok provides,* among others, that:
>
> (a) *Dr Kok is an independent contractor and not a servant of the hospital*. In this regard, we would add that the court is not precluded from looking beyond the labels ascribed by the parties to ascertain the true substance of the relationship;
>
> (b) *the hospital shall assist Dr Kok and provide the necessary backup services for Dr Kok's consultancy service;*
>
> (c) *Dr Kok is allowed to practise at the hospital on a non-exclusive basis;*
>
> (d) *Dr Kok enjoys the right and freedom to operate his medical specialist service at the hospital* without undue interference and interruption by the hospital, and shall be permitted to carry on his practice independently without obstruction or interference from the hospital;
>
> (e) *Dr Kok shall endeavour to use the hospital's facilities in the treatment of his patients*, subject to the best interests of the patient;
>
> (f) *Dr Kok is to be on call rotation at such time and for such period, and hold a number of clinical sessions as required by the hospital*;
>
> (g) *the hospital does not pay any salary or allowance to Dr Kok*; and
>
> (h) *Dr Kok may charge professional fees for consultation and procedures, whereas the hospital may levy operational, administrative or other fees*.
>
> [99] In respect of the element of control, it is clear from the doctor's practising agreement that Dr Kok's services were generally not subject to the hospital's control or interference. The same can be said in relation to the operation in question. Dr Kok was not directed or required by the hospital to conduct the operation, but advised and arranged it in the course of his own practice at his private clinic. Dr Kok's arrangement with the hospital was merely to provide for the plaintiff's admission and the necessary facilities for the operation. The absence of even a

'vestigial degree of control' by the hospital over Dr Kok's operation negates vicarious liability on its part for Dr Kok's negligence in that operation.

[100] In considering whether the operation was conducted by Dr Kok on behalf of the hospital as part of its business activity, we note that Dr Kok as a medical practitioner is generally considered as part of the hospital's organisation as a healthcare facility under the Regulations. Nevertheless, we are of the view that the specific operation in question was not undertaken on behalf of the hospital, but attributable to Dr Kok's own 'recognisably independent business'. The diagnosis of the plaintiff's condition, the advice to undergo the operation and the referral of the plaintiff to the hospital were not carried out in the course of on-call rotations or clinical sessions required by the hospital. Instead, they were done by Dr Kok in the course of his own practice in his private clinic. *The fact that Dr Kok charges consultancy and operation fees for his patients, and receives no salary from the hospital, lends further weight to the inference that the operation was part of Dr Kok's independent business*.

[101] For these reasons, we consider Dr Kok to be an independent contractor of the hospital in conducting the operation. Bearing in mind that the expanded test in Various Claimants does not extend vicarious liability to 'truly independent contractors', we do not find that the relationship between the hospital and Dr Kok is sufficiently akin to employment so as to give rise to vicarious liability for Dr Kok's negligence in conducting the operation. Since there is no such relationship, the stage 2 determination of the connection between the relationship and the tortious act does not arise. (Emphasis added.)

[36] Secondly, in the Federal Court case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427 it was held as follows:

[117] We first consider the relationship between the hospital and Dr Hari. *Dr Hari and the hospital have signed a 'Consultant's Agreement for Use of Hospital Facilities and Services', the salient terms of which are as follows*:

(a) *Dr Hari is deemed to be an independent contractor and not a servant or agent of the hospital*;

(b) *Dr Hari shall comply with the hospital's directions and regulations*, but such directions and regulations shall not impinge upon consultant's exercise of professional judgment in the care of his patients;

(c) *Dr Hari shall provide professional services for outpatients on a sessional basis in the hospital, during such periods as may be determined by the hospital*;

(d) Dr Hari may book operating sessions in the hospital for inpatients;

(e) *Dr Hari shall charge fees to his patients, which would be collected by the hospital and remitted to him monthly*; and

(f) *the hospital shall charge Dr Hari fees for facilities and services*;

(g) *Dr Hari shall ensure that he is covered by insurance, and shall indemnify the hospital against all liability resulting from his neglect or default*.

[118] It is recalled that the finding of negligence was against Dr Hari for his diagnosis, advice and treatment of the plaintiff: specifically, the negligent acts were advising the plaintiff to undergo the unnecessary second operation, failing to advise the plaintiff of the risk of bucking and blindness, and using the wrong procedure during the second operation. There was no finding of negligence relating to the provision of drugs, facilities or medical records by the hospital. As such, the relevant factors in the present case concern Dr Hari's advice and conduct of the second operation: these include whether such advice and conduct were subject to the hospital's control, done on behalf of the hospital, or a part of the hospital's business activity.

[119] The plaintiff was referred to, and first consulted, Dr Hari at his private clinic, where Dr Hari then diagnosed the plaintiff's condition and advised him to undergo the first operation. Based on Dr Hari's own testimony, the appointment with the plaintiff on 21 September 1999 was a follow-up appointment after the first operation, and the second operation was only decided on that date. Dr Hari then referred the plaintiff to the hospital for admission and conducted the second operation in the hospital. It is clear from the entire sequence of events that Dr Hari's diagnosis of the plaintiff's condition, advice to undergo the second operation and conduct of the second operation were done in the course of Dr Hari's private practice. We find no evidence that the hospital exerted any control over Dr Hari's advice and conduct of the second operation, whether over what Dr Hari did or how he did it. 'The absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability' (per *Lord Reed in Cox v. Ministry of Justice* [2016] AC 660).

[120] We consider that Dr Hari's advice and conduct of the second operation were attributable to his own recognisably independent business. The mere change in location to the hospital for the follow-up appointments on 14 September 1999 and 21 September 1999, and *the use of the hospital's facilities in conducting the second operation, did not change the independent nature of Dr Hari's business in his treatment of the plaintiff. Further, the structure of fees is also not indicative of a contract of service between employers and employees: Dr Hari charges his own fees to his patients, and is required to pay fees for using the hospital's facilities and services. The hospital's role in collecting the patient's fees and remitting them to Dr Hari is administrative in nature*. It can be inferred from these circumstances that Dr Hari's advice and conduct of the second operation were not done on behalf of the hospital, and was not a part of the hospital's business activity.

[121] Striking parallels may be drawn with the facts in Dr Kok Choong Seng. As in the present case, the patient had first consulted the surgeon at his private clinic, and it was only upon the advice and referral of the surgeon that the patient was admitted to the hospital for an operation. At the hospital, the surgeon negligently conducted the operation and the patient suffered injuries. The operation was not done in the course of any clinical session required by the hospital. The consultancy and operation fees were charged on the patient by the surgeon, who received no salary from the hospital. In all the circumstances, it was held that the surgeon and the hospital were not in a relationship of, or akin to, employment so as to give rise to vicarious liability on the hospital's part.

[122] Following Dr Kok Choong Seng, *we find that in advising the plaintiff on and*

conducting the second operation, Dr Hari was indeed acting in the capacity of an independent contractor and not an employee of the hospital. As such, no vicarious liability can be imposed on the hospital for Dr Hari's negligence. (Emphasis added.)

[37] Thirdly, in the Court of Appeal case of *Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) & Ors And Other Appeals* [2018] 5 MLJ 321; [2018] 6 CLJ 334:

[48] The learned JC held that the hospital was vicariously liable for breach of duty of care to the patient *based on the following clauses of the agreement of the doctor with the hospital*:

(i) cl 5.4 — the doctor is automatically become member of the Medical and Dental Staff of the Hospital and subject to the by-laws of the Medical and Dental Staff.

(ii) cl 5.5 — *the doctor only provides his services during office hours of working days of the Hospital*.

(iii) cl 5.6 — *the doctor to devote all his time, attention and abilities to the business of the Hospital*.

(iv) cl 5.10 — the doctor to provide 24 hours coverage for all patients admitted to the Hospital under his care and service and the doctor must be one who his (sic) credential and approved by the hospital.

(v) cl 5.11 — the doctor must insure (sic) the patients medical record must be completed within 5 working days from the date of discharge of the patients and failing which the Hospital has the right to withhold payment of the medical fees.

[49] As for Dr Patrick, the learned JC stated that he was involved in the surgery on 4 June 2008 only upon the approval of the hospital, and the hospital's executive committee had agreed to give him a fee of RM5,000.

[50] Having analysed all the facts, the learned JC concluded that the hospital had some control over the doctors in the performance of their duty in the hospital. In totality, he found that the doctors were in fact the agents of the hospital in providing the healthcare to the patient. Therefore, the learned JC held that the hospital was vicariously liable for the negligent acts of the doctors.

[51] In considering these appeals, we are guided by the recent Federal Court decision in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 ('Sunway case'). In that case, the Federal Court considered the two-stage test in *Various Claimants v Catholic Child Welfare Society And Others* [2013] 2 AC 1 which the Supreme Court laid down for imposing vicarious liability for the tortious acts of abuse by the brothers in the religious institute:

(1) Whether the relationship between D1 and D2 is sufficiently akin to that of employer and employee; and

(2) Whether there is a sufficiently close connection between the Dl-D2 relationship and D1's tortious act.

[52] In the *Sunway* case, in deciding the fourth question, namely:

Whether private hospitals in Malaysia such as the appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?' the Federal Court at p 565 stated:

The test for vicarious liability in various claimants requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

[53] From a perusal of contract entered into by the hospital with Dr Cheok and Dr Patrick respectively, *it is clear that the contract was one for services, and both doctors are independent contractors, and not agents or employees of the hospital. As submitted by the hospital, both doctors operated independent businesses free from the control, interference, and/or obstruction by the hospital management*. We note that in fact both Dr Cheok and Dr Patrick have specifically pleaded that they were independent contractors. Therefore, the learned JC had erred in holding that the hospital was vicariously liable for the alleged negligence of these two doctors. (Emphasis added.)

[38] Finally, in the High Court case of *Wu Siew Yong v Pulau Pinang Clinic Sdn Bhd & Anor* [2011] 3 MLJ 506; [2011] 1 CLJ 255, it was held as follows:

[22] Having perused the whole agreement D18 as well as the evidence produced and applying the tests as laid down above, I am inclined to agree with the submission by the first defendant that there is an absence of such special relationship between first defendant and second defendant on the following grounds:

(a) *The second defendant is free to operate his own clinic, accepting whosoever patients he wants and the second defendant is at liberty to charge a different fee from the patient despite there is a schedule of fees.*

(b) The second defendant has full control over his own clients/patients in their treatment, management and care. *He controls over his own work and the method he wishes to perform his work.*

(c) The first defendant does not pay any remuneration to *the second defendant but conversely, the second defendant would have to allow 22.5% of his gross fees earned to be deducted towards usage of the first defendant's facilities* (cl 5, D18). Bearing in mind that the first defendant is providing all the facilities of a hospital to the second defendant, the deduction of 22.5% of the gross fees earned by the second defendant can only be construed as payment by the second defendant for such usage of those facilities only. *I do not agree*

with the plaintiff's contention that such payment connotes a special relationship of an employer-employee.

(d) *The second defendant will have to immediately take out insurance coverage and shall maintain such policies to keep himself insured at all times during the subsistence of the agreement with the first defendant* (cl 7(f), D18). *If there is such an employer-employee relationship as contended by the plaintiff, insurance coverage of an employee would be generally provided by employer* if the employee is not covered under SOCSO.

(e) On cl 6 which provides that the first defendant shall allow the second defendant 30 days leave in every calendar year, the plaintiff contended this shows the special relationship of employer-employee. Reading the second paragraph that follows in cl 6, *which requires the second defendant to arrange and secure the services of a consultant colleague to provide cover during any period of leave, it corroborated evidence of the first defendant that there should be no vacancy of any consultant in attendance as the hospital must have a consultant at all times. If there is employer-employee relationship as contended by the plaintiff, when the employer who retains his full discretion to approve vacation leave and once the leave of the employee is approved, it becomes the duty of the employer to arrange for a replacement worker and not the duty of the employee to find such a replacement before he goes on his vacation leave.*

(f) The negligent act and wrongful act complained of by the plaintiff are in relation to the personal acts of the second defendant in the treatment, management and care of the plaintiff which the second defendant retains full control. Therefore, the first defendant cannot be said to be vicariously liable. (Emphasis added.)

[39] Coming back to the facts in the present case, in order to ascertain firstly the nature of the relationship between the applicant and the first respondent, the salient terms of the second agreement must firstly be perused. The following are my findings.

[40] Firstly, the express, clear and unambiguous intention of the applicant and the first respondent regarding their relationship is stated under cl 16.1 and 16.2 which provides that:

16. RELATIONSHIP BETWEEN THE PARTIES

16.1 *The Resident Consultant agrees that he is an independent contractor and not the agent or servant of the Hospital*.

16.2 Nothing herein contained shall constitute or be deemed to constitute a partnership or agency, *nor shall it create the relationship of employer and employee, between the parties hereto*. (Emphasis added.)

[41] Similar provision can be found in *Dr Hari Krishnan* and *Dr Kok Choong Seng*'s case. However, it is important to note that the court is not precluded

from looking beyond the labels ascribed by the applicant and the first respondent to ascertain the true substance of their relationship.

[42] Secondly, as can be seen under cl 5.1, 5.6 and 5.7, the first respondent is at liberty to charge any amount of fees to his patients for his services despite there being a schedule of fees. The only function of the hospital in the collection of fees is administrative in nature where the hospital is responsible of centrally collecting the fees and remitting them to the first respondent on a monthly basis. It can also be seen that the fees will be remitted monthly to the first respondent after deducting all fees, charges or other payments due to the hospital. On particular example is the deduction of fees due to the usage of the hospital's equipment and medical instruments. This can be seen under cl 9.2 which provides that the first respondent 'shall make use of the hospital's equipment and medical instruments and shall pay to the hospital fees for such usage as may be determined from the hospital from time to time'.The Federal Court in *Dr Hari Krishnan*'s case held that:

> [120] We consider that Dr Hari's advice and conduct of the second operation were attributable to his own recognisably independent business. The mere change in location to the hospital for the follow-up appointments on 14 September 1999 and 21 September 1999, and *the use of the hospital's facilities in conducting the second operation, did not change the independent nature of Dr Hari's business in his treatment of the plaintiff. Further, the structure of fees is also not indicative of a contract of service between employers and employees: Dr Hari charges his own fees to his patients, and is required to pay fees for using the hospital's facilities and services. The hospital's role in collecting the patient's fees and remitting them to Dr Hari is administrative in nature*. It can be inferred from these circumstances that Dr Hari's advice and conduct of the second operation were not done on behalf of the hospital, and was not a part of the hospital's business activity. (Emphasis added.)

[43] On a separate note, cl 12 of the second agreement provides that the first respondent shall pay to the hospital the agreed administrative charges on a monthly basis to the applicant. It is safe to say that such a practice is unheard of in any contract of service since there is no need for an employee to pay any administrative charges to the employer, since they are of the same organisation. This would strengthen the finding that the first respondent was indeed an independent contractor of the applicant and the hospital.

[44] Thirdly, cl 5.7 provides that the hospital is to pay the first respondent's professional fees to a company known as Gemilang Auto Perkasa Sdn. Bhd. and not personally to the first respondent himself.

[45] Fourthly, cl 14.4 and 14.5 provides that the first respondent is to take out an adequate professional indemnity insurance policy at his own cost and expenses to cover himself and his medical practice at the hospital. In a contract

of service, the insurance coverage of the employee would be generally be provided by the employer. In this respect I agree with the findings of the High Court in *Wu Siew Yong*'s case as follows:

> 4. *The second defendant will have to immediately take out insurance coverage and shall maintain such policies to keep himself insured at all times during the subsistence of the agreement with the first defendant*. (Clause 7(f) D18). *If there is such an employer-employee relationship as contended by the plaintiff, insurance coverage of an employee would be generally provided by employer* if the employee is not covered under SOCSO. (Emphasis added.)

[46] In addition, cl 14.4 and 14.5 above should be read together with cl 15 which provides that the first respondent is liable for his own acts, defaults, negligence or omissions in the conduct of his professional practice and shall indemnify the hospital in such an event. The following is observed:

> 15. LIABILITIES AND DAMAGES
>
> 15.1 *The Resident Consultant shall be liable for the acts, defaults, negligence or omissions in the conduct of his professional practice at PCSH, TPCMA and/or PCSH shall not be responsible for any accidents, happenings, injuries sustained, loss or damages, whatsoever, as a result of such acts, defaults, negligence or omissions by the Resident Consultant.*
>
> 15.2 *The Resident Consultant hereby agrees and undertakes to indemnify, hold harmless and keep TPCMA and PCSH indemnified against all costs, demands, claim, liabilities, losses, damages, proceedings, actions, fines and prosecutions* taken against or suffered by TPCMA and/or PCSH as a result of the dealings between GAP and PSCH including but not limited to the payments made by PSCH to GAP on behalf of the Resident Consultant. (Emphasis added.)

[47] Similar provision can be found in *Dr Hari Krishnan* and *Dr Kok Choong Seng*'s case.

[48] Fifthly, under cl 16.3, it was agreed that the applicant and the hospital will not make any Employee Provident Fund ('EPF') and Social Security Organisation ('SOCSO') contribution to the first respondent. The payment of EPF and SOCSO contribution is one of the main indicator of an employer and employee relationship. In this case, first respondent and the applicant have agreed to waive the payment of the contribution. This to my mind, clearly indicates that their relationship is not that of a contract of service.

[49] Sixthly, under cl 4.3, the first respondent is required to provide consultancy and other related services at the hospital and to be personally present to render such services for not less than 90% of the working days of the hospital unless the first respondent arrange for a locum to stand in during his absence and obtained prior written consent of the hospital to such

arrangement. Clause 10.3 further provides that in the event the first respondent is absent from the hospital for whatever reason, he must personally at his own expense provide a duly qualified locum to substitute him. On this I agree with Chew Soo Ho JC (as he then was) in *Wu Siew Yong*'s case that:

> (e) On cl 6 which provides that the first defendant shall allow the second defendant 30 days leave in every calendar year, the plaintiff contended this shows the special relationship of employer-employee. Reading the second paragraph that follows in cl 6, which *requires the second defendant to arrange and secure the services of a consultant colleague to provide cover during any period of leave*, it corroborated evidence of the first defendant that there should be no vacancy of any consultant in attendance as the hospital must have a consultant at all times. *If there is employer-employee relationship as contended by the plaintiff, when the employer who retains his full discretion to approve vacation leave and once the leave of the employee is approved, it becomes the duty of the employer to arrange for a replacement worker and not the duty of the employee to find such a replacement before he goes on his vacation leave*. (Emphasis added.)

[50] Finally, it can also be seen under cl 18.1 that the duration of the agreement was only for a definite term ie until 31 December 2013 but both parties have the right of termination by way of written notice. There was no requirement to give any reason for termination of the agreement. Therefore, the first respondent in the present case did not enjoy a continuous employment for an indefinite period.

[51] I pause here to note that the terms of the first agreement is the same as that of the second agreement.

[52] Now that the terms of the second agreement has been perused, I turn to consider the overall surrounding circumstances of the case. This is my findings.

[53] Firstly, even from 1995 to 1997, the first respondent was never directly engaged or employed by the applicant. Rather the first respondent was consistently referred to as either a substitute, a backup or an assistant engaged by other independent resident consultants at the hospital.

[54] Secondly, the terms governing the first respondent's practising privileges before 2010 had clearly shown that the first respondent was merely an independent contractor to the applicant and the hospital. The first respondent's practising privileges were consistently and expressly stated to be temporary and he did not enjoy any possibility of a continuous employment for an indefinite period.

[55] Thirdly, the hospital was only contractually obliged to remit fees to the resident consultants. The resident consultants had separateand private

remuneration arrangements with the first respondent as their substitute.

[56] Fourthly, the hospital never paid any salary to the first respondent. The first respondent also did not pay tax as an employee of the hospital and would not be paid any money even if he went on leave.

[57] Lastly, the fees collected by the first respondent was for his professional services rendered and he was free to enter into such private and independent arrangement on remuneration sharing with another person.

[58] Clearly, based on all of the above, it can safely be concluded that the relationship between the first respondent and the applicant was based on a contract for service, and that the first respondent was clearly an independent contractor of the applicant.

[59] I am of the considered opinion that the second respondent had fallen into error when it failed to evaluate the relevant, clear and express evidence above and took into account other irrelevant consideration in coming to its decision.

[60] The second respondent inferred the relationship between the applicant and the first respondent as that of service based on the following.

[61] Firstly, the second respondent noted that the first respondent was prohibited from practising in another hospital when he was in service to the hospital. The relevant provision under the second agreement would be cl 4.5 which provides as follows:

> 4.5 The Resident Consultant shall practice actively and exclusively only at PCSH and maintain his presence and devote his whole time and attention at PCSH during normal working hours except during his holidays or periods of incapacity and will not to have practicing rights and privileges at any other hospital, whether honorary or otherwise, without the prior written consent of PCSH and/or TPCMA.

[62] However, upon careful perusal of this particular clause, I fail to see any form of control so as to establish an employer and employee relationship between the first respondent and the applicant so as to affect how the first respondent controls over his own work and the method he wishes to perform his work. It merely states that the first respondent is to actively and exclusively maintain his presence and devote his whole time and attention at the hospital, which, to my mind, is required regardless of whether a person is under a contract of service or a contract for service in the same professional field.

[63] Secondly, the second respondent noted that the first respondent is

required to render his services to patients referred by the hospital and he has no liberty to choose his patients. What the second respondent failed to consider is that the first respondent is a consultant anaesthetist whose practise generally does not have any clinic or walk-in patients. It is a generally known fact that an anaesthetist generally attends patients who have already been admitted to the hospital and who are undergoing surgery. Therefore, I failed to see any form of control against the first respondent in the present case. The case of *Hari Krishnan* is on point.

[64] Thirdly, the second respondent noted that the first respondent has to obtain or buy all medications only from the hospital. In this regard I have gone through cll 7.1 and 9.4 and found that these clauses merely stipulate that all of the first respondent's patients must be directed to obtain their medications and drugs from the hospital's pharmacy. Furthermore, the prohibition against purchasing new equipment, instruments and medications when the same are available in the hospital is not a total prohibition where a prior consent may be obtained if the first respondent chose to do so. Furthermore, it does not prohibit the first respondent from purchasing new medications if the same are not available in the hospital.

[65] Fourthly, the second respondent noted that the first respondent is subject to the working hours stipulated by the hospital. I fail to see this as a form of control substantial enough to be considered as a factor to determine an employer and employee relationship. The first respondent was a resident consultant anaesthetist, who is expected to be present and to render his services during an operation or surgery. This provision is only there to ensure business efficacy and that the first respondent is there when his services are needed. It did not affect the first respondent in terms of his control over his own work and the method he wishes to perform his work. In *Kee Boon Suan*'s case, the Court of Appeal made the following observation:

> (i) clause 5.4 — the doctor is automatically become member of the Medical and Dental Staff of the hospital and subject to the by-laws of the Medical and Dental Staff.
>
> (ii) clause 5.5 — *the doctor only provides his services during office hours of working days of the hospital*.
>
> (iii) clause 5.6 — *the doctor to devote all his time, attention and abilities to the business of the hospital* ...
>
> ... [53] From a perusal of contract entered into by the hospital with Dr Cheok and Dr Patrick respectively, *it is clear that the contract was one for services, and both doctors are independent contractors, and not agents or employees of the hospital*. As submitted by the hospital, both doctors operated independent businesses free from the control, interference, and/or obstruction by the hospital management. (Emphasis added.)

[66] Lastly, the second respondent also noted that first respondent is subject to the compliance with all by-laws, rules and regulations, and procedures in the hospital as can be seen under cl 4.1 of the second agreement. Even in the evidence itself, Dr Mah Kin Kheong (COW2) stated that the regulations and standard operating procedures are required to be complied with even by independently contracted doctors to ensure proper functioning of the hospital and for due compliance with the law. This is purely administrative and procedural in nature. Nowhere was it provided that the first respondent's exercise of professional judgment in the care of his patients is impinged in any way.

[67] In a nutshell, I find that the second respondent had committed an error of law based on all of the above. It is trite that an inferior tribunal or other decision making authority in exercising its quasi-judicial or administrative function has no jurisdiction to commit an error of law. Some of the examples when an error of law is committed is when the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law. In the exact words of Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748:

> In my judgment, the true principle may be stated as follows. *An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction*. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. *But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he miscontrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law*.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted. (Emphasis added.)

[68] See also *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*

[1995] 3 MLJ 369; [1996] 4 CLJ 687 (FC) and *UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor* [2014] 3 MLJ 457; [2014] 5 CLJ 906 (CA).

CONCLUSION

[69] Therefore, for the very reasons mentioned above, I agree with the submissions by the learned counsel for the applicant. Therefore, the applicant's application is allowed with costs of RM5,000 subject to allocator.

Application allowed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain bin Ab Fatar